



## Pay-roll Tax

### Employee Share Acquisitions

*Pay-roll Tax Assessment Act 2002*

**As at 1 July 2012**

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#### Introduction

From 1 July 2009, new legislation applies regarding the treatment for pay-roll tax purposes of the provision of shares, or rights ("options") to acquire shares, to an employee made by an employer.

Refer to sections 9DA – 9DH of the *Pay-Roll Tax Assessment Act 2002* ("the Act").

#### Background prior to 1 July 2009

Prior to the commencement of the new legislation, any employer contribution to an employee share acquisition scheme was a specified taxable benefit (and therefore wages) for the purposes of the Act, and a pay-roll tax liability occurred at the date the employer made a contribution to the scheme ("the grant"), whether the grant of the shares or option was subject to any conditions or performance criteria or otherwise, and whether or not the employee subsequently exercised the option (in the case of an option).

These provisions applied to shares, options to acquire shares, units in a unit trust or options to acquire units in a unit trust.

#### Major changes as a result of the new provisions

- Employers will in most circumstances now be able to elect the date pay-roll tax is payable on the liability.
  - Units in a unit trust, and options to acquire units in a unit trust, are no longer within the scope of the pay-roll tax legislation, unless the acquisition of a unit or the option to acquire a unit is a property fringe benefit for the purposes of fringe benefits tax (in which case the fringe benefit provisions relating to pay-roll tax apply on the acquisition), or unless the unit is part of a stapled security – see below.
  - The providing of a share or option to acquire a share is no longer a specified taxable benefit for the purposes of the Act. From 1 July 2009 the grant of a share or option is included in the
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definition of wages if the share or option is an Employee Share Scheme (“ESS”) interest within the meaning of section 83A–10 of the *Income Tax Assessment Act 1997* (Cwth) and it is granted to the employee under an employee share scheme within the meaning of that section. An employee share scheme is a scheme under which ESS interests in a company are provided to employees (or associates of employees), including past and prospective employees of the company or any subsidiary of the company.

- A share or option is granted to an employee if:
  - (a) another person transfers the share or option to that person (other than, in the case of a share, by issuing the share to that person); or
  - (b) in the case of a share — another person allots the share to that person; or
  - (c) in the case of an option — another person confers the option on, or otherwise creates the option in, that person; or
  - (d) the person otherwise acquires a legal interest in the share or option from another person; or
  - (e) the person acquires a beneficial interest in the share or option from another person.

To avoid doubt, if an employee acquires a right to be granted a share or an option, or some other material benefit, at the employer’s election, the share or option is not granted until the employer elects to grant the share or option.

- The definition of “share” now includes a stapled security, and any stapled security will be valued as if it were a share.
- Section 9DD(3) provides that the value of a share or option is the market value or the amount as determined by Division 83A of the *Income Tax Assessment Act 1997* (Cwth), and the regulations made for the purposes of that section.
- An employer can elect by which method the value of a share or option is to be made, in accordance with the above.
- Employers will now be able to seek credit of tax paid in some circumstances where conditions attached to the shares or options on granting have not been met by the employee.
- New provisions govern where the liability arises when a share or option to acquire a share has taken place (or will take place).

These provisions do not apply if the grant of the share or option is wages under any other provision. Note that a grant of a share or an option that is not an ESS interest will be liable to pay-roll tax as a fringe benefit under Subdivision 2 of Division 2A of Part 2 of the Act.

## When does a liability occur?

From 1 July 2009, the grant of a share or an option by an employer to an employee in respect of services performed by the employee is taken to be wages. Wages constituted by the value of the share or option are taken to be paid on the “relevant day”. A “relevant day” is the day that the employer elects to treat as the day on which the wages (the grant of the share or option) are paid or payable.

The effect of this is that an employer can elect to treat as the relevant day either:

- the date on which the share or option is *granted* to the employee; or
- the *vesting* date of the share or option.

## What is meant by vesting date?

This depends on whether the contribution is a share or an option.

For a **share**, the vesting date occurs at the earlier of two events:

- when any conditions (for example, performance criteria) attached to the grant of the share have been met AND the employee's legal or beneficial right in the share cannot be rescinded; or
- the day at the end of the period of 7 years from the day on which the share is granted to the employee.

For an **option**, the vesting date occurs at the earliest of three events:

- the date on which the share to which the option relates is granted to the employee; or
- the date on which the right under the option to have the relevant share transferred, allotted or vested is exercised by the employee; or
- the day at the end of the period of 7 years from the day on which the option is granted to the employee.

## What happens if the employer does not elect at the time of grant?

If no election to treat the grant date as the relevant day is made (by including the value of the share or option as wages in a pay-roll tax return in the financial year in which the share or option is granted), section 9DC(1) of the Act provides that the relevant day is taken to be the vesting date (subject to the provisions below).

Any grant of a share or option made by someone acting on behalf of the employer is taken to be made by the employer.

## What if the value of the share or option at granting date is nil?

If the employer grants a share or option to an employee and the value of the share or option is nil, or if the employer were to elect to treat the grant date as the relevant day and on that day the wages constituted by the grant were not liable to pay-roll tax, the employer is taken to have elected to treat the wages constituted by the grant of the share or option as being paid or payable on the day on which the share was granted.

## How is the liability calculated?

As stated above, the “relevant day” is the day on which the employer elects to treat the wages (the grant of the shares or options) as paid or payable.

The value of the share or option is the value on the relevant day, expressed in Australian currency, less any consideration paid or given by the employee for the share or option (except any consideration made in the form of services provided).

## If tax is paid on the liability but the share or option does not vest, is there scope for credit?

Before 1 July 2009, because the liability was based upon the grant of the share or option and its value did not take into consideration any conditions attached to the grant, there was no scope for employers to seek credit or refund when performance criteria were not met, or other factors occurred that resulted in the employee not becoming entitled to the share or option.

In situations where a share or option is withdrawn, cancelled or exchanged before the vesting date for any valuable consideration made by the employer (other than the grant of other shares or options) the valuable consideration is taken to be wages equivalent to the market value of the share or option as of the date of withdrawal, cancellation or exchange.

However, where an employer includes as wages the value of a grant of a share or an option in a pay-roll tax return, and the grant is rescinded because any conditions attached to the grant (such as performance criteria) are not met, the wages are to be reduced by the value of the grant that was included in the return.

No reduction in wages can occur because an employee fails to exercise an option or otherwise does not exercise his or her rights in respect of a share or option.

## Are directors included within these provisions?

From 1 July 2009, the provisions at section 9DG allow for the granting of shares to a director of a company, as remuneration for his appointment or services to the company, to be treated as wages.

This provision also refers to former directors of the company and prospective directors of the company.

Where the director is appointed, but no services have been carried out, the grant of the share or option is taken to be granted as though such services have been carried out, and at the place where the services could reasonably be expected to be carried out.

## In which jurisdiction does the liability occur?

Section 5(1) of the Act states that pay-roll tax is payable on WA taxable wages. WA taxable wages are detailed at sections 6A – 6D of the Act, and mean:

- a) wages for services carried out wholly in WA in a month irrespective of where they are paid or payable.

Where a) does not apply, WA taxable wages means:

- b) wages that are paid or payable to a person who is based in WA; or
- c) paid by an employer that is based in WA; or

d) wages that are paid or payable in WA.

For more detailed information, please refer to [Revenue Ruling PTA 039 Nexus Provisions](#)

When it is necessary to consider whether wages are paid or payable in WA (see d) above), then where the share, or the underlying share where there is an option, is in a *local* company, the wages payable relating to the grant of the share or option are taken to be paid in WA.

A “local company” means a company incorporated under the *Corporations Act 2001* (Cwth) that is registered in WA.

If, for example, the employee performs all services in WA, but the share or option made available by his employer (and therefore taken to have been paid) is not in a local company (i.e. the company is not registered in WA), the grant of the share or option will still be liable in WA, because as all of the services are performed in WA, all wages will be taxable in WA, irrespective of where the share or option is paid.

See further examples at Appendix 1.

### **Where an employer has used a different valuation method of shares/options (period from 1 July 2009 to 30 June 2011) and lodged a return accordingly**

Employers relying solely on the provisions of section 9DD of the Act as it stood before 1 July 2011 may have valued shares or options under the provisions of Subdivision F of Division 13A of the *Income Tax Assessment Act 1936* (Cwth).

In cases where an employer has declared on a return the grant of shares/options as wages for the period from 1 July 2009 until 30 June 2011 and has used a valuation method in line with Division 13A for that period, the Commissioner will not reassess that return using the provisions of Division 83A of the *Income Tax Assessment Act 1997* (Cwth), by virtue of the operation of section 25 of the *Revenue Laws Amendment Act 2012*.

## Appendix One

### Place where wages paid

The following list of examples is not exhaustive, and if in doubt, you should consult the Office of State Revenue accordingly. In each example, it is taken that the employer has elected to treat the grant date as the relevant day.

These examples should be considered with reference to the nexus provisions for WA pay-roll tax purposes. These nexus provisions are found at section 6A to 6D of the Act, and in [Revenue Ruling PTA 039 Nexus Provisions](#).

- **Example 1:** An employee carries out all of his services in WA, but is granted an option for a company registered in NSW. His employer is based in NSW, and pays his wages from there to a WA bank account.

Although the company is not “local”, the employee carries out his services wholly in WA. As such, all of his wages are taxable wages and liable in WA, including the provision of the option.

- **Example 2:** An employee carries out all of his services in SA, but is awarded an option for a WA registered company. The company is based in WA and pays his wages to a WA bank account.

Although the company is “local”, the employee carries out his services wholly in another State. As such, his wages, including the granting of the option, are not taxable wages for WA purposes. (They are however taxable in SA).

- **Example 3:** An employee carries out all of his services in SA, but is awarded an option for a NSW registered company. The company has a base in WA and pays his wages from that base to a WA bank account.

As the employee works wholly in another State, his taxable wages are liable in that other state (SA). There may be liability on the grant of the share or option in the jurisdiction in which the company is registered, and that jurisdiction should be contacted accordingly.

- **Example 4:** An employee carries out half his services in WA, and half in Queensland, but is awarded an option for a WA registered company. The company is based in WA and pays his wages to a WA bank account. The employee is resident in WA.

As the wages do not relate to services performed wholly in another State, the taxable wages, including the grant of the share or option, are liable in WA, as the employee is based in WA.

**Note:** The information contained in this FACT SHEET is issued for guidance purposes only. It is not an exhaustive explanation of the provisions of the *Pay-roll Tax Assessment Act 2002* and reference should be made to the Act for complete details.

## Contact the Office of State Revenue

<b>Office</b>	Office of State Revenue Plaza Level 200 St Georges Terrace PERTH WA 6000	<b>Telephone</b>	(08) 9262 1300 1300 368 364 (WA country STD callers only – local call charge)
<b>Office hours</b>	8:00 am – 5:00 pm Monday to Friday	<b>Facsimile</b>	(08) 9226 0841
<b>Postal</b>	Office of State Revenue GPO Box T1600 PERTH WA 6845	<b>Web Enquiry</b>	<a href="http://www.osr.wa.gov.au/PayrollEnquiry">www.osr.wa.gov.au/PayrollEnquiry</a>
		<b>Website</b>	<a href="http://www.osr.wa.gov.au">www.osr.wa.gov.au</a>